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No. 91-1432

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NIGERIAN NATIONAL PETROLEUM CORPORATION,

Petitioner,

vs.

CARIBBEAN TRADING AND FIDELITY CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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April 8, 1992

QUESTIONS PRESENTED

1. Whether the district court may promulgate a local rule requiring that all arguments in opposition to a motion be timely raised before the motion is submitted and decided, and not be raised for the first time on a motion for reconsideration of the decision?

2. Whether the settled rule that an interlocutory order requiring the posting of security is not immediately appealable should be disregarded merely because the party required to post security is an agency of a foreign state?

STATEMENT PURSUANT TO RULE 29.1

Respondent Caribbean Trading and Fidelity Corporation has no parent companies or subsidiaries.

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STATEMENT OF THE CASE

Respondent Caribbean Trading and Fidelity Corporation ("CTFC"), appellee below, respectfully requests that this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit filed by Petitioner Nigerian National Petroleum Corporation ("NNPC") seeking review of the opinion of the Court of Appeals entered on October 30, 1991 (the "Petition").

A. Proceedings In The District Court

The Court of Appeals decision affirmed an April 17, 1991 order of the United States District Court for the Southern District of New York (Hon. John F. Keenan) denying a motion for reconsideration of his earlier order, issued in December 1990, requiring NNPC to post security of $10,255,728.80

pending the outcome of related proceedings in Nigeria. The December 1990 order arose out of a petition brought by CTFC to confirm and enforce an arbitration award rendered in CTFC's favor against NNPC in Nigeria in March 1990. Enforcement of the award is sought pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 3 U.S.T. 2517, T.I.A.S. No. 6997, codified at 9 U.S.C. §§ 201-208 (1970) (the "Convention").

In October 1990, NNPC had moved to dismiss CTFC's petition on various grounds. NNPC also argued that if CTFC's petition were not then dismissed, the enforcement action should be stayed pending resolution of NNPC's challenge to the award in the courts of Nigeria. NNPC based its request for a stay on Article VI of the Convention, which

expressly provides that the district court, upon granting a stay, may order the party resisting enforcement of the award to "give suitable security." (See App. A-47.)[1]

In response to NNPC's request for a stay, CTFC urged that if such a stay were granted NNPC should be required to post security in an amount sufficient to cover the damages specified in the award and the additional damages that had accrued since entry of the award. In its reply papers NNPC did not challenge the district court's power to require the posting of such security. Rather, NNPC argued only that the amount of security sought by CTFC was too high.

On November 26, 1990, the district court heard oral argument in connection with the pending motions. At

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[1] References to the Appendix to the Petition are indicated as "App. ___."

oral argument CTFC's counsel reiterated the request for security and NNPC repeated its earlier argument that the amount sought was too high. At no time before or during oral argument, however, did NNPC contend that an order requiring the posting of security constituted a "prejudgment attachment," within the meaning of section 1609 of the Foreign Sovereign Immunities Act of 1976 (the "FSIA"), which prohibits prejudgment attachments against foreign states unless, in accordance with section 1610(d)(1) of the FSIA, the foreign state has "explicitly waived" its immunity from such attachment.[2]

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[2] Section 1609 of the FSIA provides that the property of a foreign state shall be immune from prejudgment attachment except where, as provided by section 1610(d), the foreign state has explicitly waived its immunity and the attachment is necessary to secure satisfaction of a judgment. See 28 U.S.C. §§ 1609, 1610(d)(1), reproduced at App. A-46.

On December 18, 1990, the district court issued its order staying the enforcement action pending the outcome of the related proceedings in Nigeria. (App. A-12 -- A-25.) That order also required NNPC to post security with the Clerk of the Court in the amount of $10,255,728.80. (See App. at A-24 -- A-25.)

Thereafter, NNPC moved for reconsideration of the December 1990 order. NNPC's motion was made pursuant to Civil Rule 3(j) of the Local Rules of the Southern District of New York (see App. at A-49), which requires that the motion set forth the "matters or controlling decisions which counsel believes the court has overlooked." On the motion for reconsideration, NNPC argued for the first time that: (a) an order requiring the posting of security as part of a stay was tantamount to the

issuance of a prejudgment attachment; (b) NNPC had not explicitly consented to any such attachment; and (c) the December 1990 order therefore violated section 1609 of the FSIA.

By order dated April 17, 1991, the district court denied NNPC's motion for reconsideration and declared that its earlier order remained in full force and effect. (App. A-26, A-31.) The district court held that under Local Rule 3(j) NNPC's argument that it was immune from prejudgment attachment could not be asserted for the first time on a motion for reconsideration. (App. A-30.)

B. Proceedings In The Court of Appeals

The majority of the Second Circuit panel held that NNPC's appeal from the district court's April 17, 1991 order should be dismissed for lack of jurisdiction. The basis for this

holding was the well-settled rule that orders requiring the posting of security are not immediately appealable. (App. at A-4 -- A-7.)[3] As the majority explained, orders requiring the posting of security do not present an exceptional circumstance warranting immediate appellate review because such orders "generally cause no irreparable loss in that parties posting security will be repaid with interest if they prevail." (App. at A-5.)

The majority rejected NNPC's contention that this order was immediately appealable on NNPC's theory that it was analogous to cases involving

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[3] The majority opinion noted that "doubt exists" as to whether an order under the Convention requiring the posting of security as part of a stay constitutes an "attachment" within the meaning of the FSIA, but nevertheless assumed for purposes of the appeal that the order appealed from fit within the definition. (App. at A-6.)

claims of immunity from suit, which are immediately appealable. (App. at A-5 -- A-6.) Claims of immunity from suit, the majority observed, implicate a party's right to be free from the expense and burden of defending a case. A later ruling, after trial, that such immunity existed will not redress this injury. In contrast, the wrongful denial of a claim of immunity from prejudgment attachment can be remedied by the repayment of the security, with interest. For this reason the majority perceived "no reason to distinguish for purposes of appellate review between an order granting security that is erroneous on the merits and an identical order that is issued in the face of a statute such as the FSIA stating that a party is 'immune' from such an order." (App. at A-7.)

Treating the appeal as a petition for mandamus, the panel unanimously agreed that the petition should be denied on the narrow ground that the district court had properly refused to consider the merits of NNPC's new argument because it was raised for the first time on a motion for reconsideration. (App. at A-7 -- A-8, A-11.)

The Court of Appeals rejected NNPC's argument that Local Rule 3(j) was somehow violative of the FSIA because the Rule required NNPC to assert its section 1609 defense in a timely manner. Observing that this defense does not go to the subject-matter jurisdiction of federal courts, the Court of Appeals rejected NNPC's contention that it was free to raise it at any time:

> We believe that the applicability and effect of Section 1609 are not matters, like subject-matter jurisdiction, that may be

> raised at any time by a foreign state. We therefore believe that a district court may require a foreign state to invoke Section 1609 in its initial response to the opposing party's request for an order of attachment, and the court may reject as untimely any later assertion of Section 1609's prohibitions. This wholly procedural rule does not infringe on the prerogatives of a foreign state under the FSIA. It merely imposes orderly procedures upon the assertion of those prerogatives. Judge Keenan's refusal to address the merits of NNPC's belated invocation of Section 1609 was thus neither a usurpation of power nor a clear abuse of discretion. Treating the appeal as a petition for a writ of mandamus, we deny the petition. (App. at A-8.)

REASONS FOR DENYING THE WRIT

1. The Decision Below Turns Upon A Local Procedural Rule

Petitioners contend that the Second Circuit's decision violates the express terms of the FSIA and creates a conflict in the circuit courts. Petition at 9. Neither of these arguments has merit.

All that is involved in this case is the interpretation of a local procedural rule governing when a party must present its arguments on a motion. The Court of Appeals went out of its way to observe that its decision "is not a ruling, of course, that anything NNPC did amounted to an explicit waiver pursuant to section 1610(d)(1)" of the FSIA, but was only a "ruling that the section 1610(d)(1) defense was not timely asserted." (App. at A-11.) Thus, NNPC's urgings that the decision below has "in one stroke ... swept away the FSIA's immunity provision and reinstated the availability of prejudgment attachment which Congress so carefully and specifically eliminated" (Petition at 14) is nothing more than empty rhetoric.

The Second Circuit's decision does not implicate any far-reaching concerns

involving a court's jurisdiction to order prejudgment attachment of a foreign sovereign's assets. The legal principle set forth by the Second Circuit -- that, with regard to matters not involving subject-matter jurisdiction,[4] a foreign state must abide by a procedural rule requiring that such matters be raised in a timely fashion -- is hardly remarkable. Moreover, given the unusual facts of

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[4] The subject-matter jurisdiction of the district court derives from 28 U.S.C. § 1330(a), which provides that the district court shall have subject-matter jurisdiction of claims "with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement." (Emphasis added.) NNPC's claim of immunity from prejudgment attachment rests on section 1609, not sections 1605-1607. Accordingly, it is clear that the subject-matter jurisdiction of the district court is in no way dependent upon a showing that the "explicit" waiver requirement of sections 1609 and 1610(d)(1) have been satisfied.

this case, the decision is unlikely to have wide application.

NNPC's argument is that the "explicit" waiver requirement permits it to raise an objection to an attachment, at any stage of the proceedings, even if NNPC repeatedly has failed to raise such an objection at earlier opportunities. NNPC has cited no authority for this proposition and it is unlikely that Congress intended to permit a foreign sovereign to engage in such litigation tactics.

Finally, NNPC's claim of a conflict in the circuits is without foundation. The decisions cited by NNPC consider what conduct constitutes an "explicit waiver." (See Petition at 14-16.) NNPC has not cited a single case which has considered whether a local rule may require a party to assert a section 1609 defense at the time when

a motion is made to require the posting of security in connection with a stay. Since the decision below does not offer any view as to what conduct would constitute such an "explicit waiver," it obviously cannot be in conflict with the decisions noted by NNPC.

2. **The Ruling On Appealability Does Not Warrant Review**

NNPC asserts that the Court should grant certiorari to "resolve the conflict and dispel the confusion concerning the appealability of district court denials of immunity claims." (Petition at 18.) There is no such conflict or confusion.

NNPC acknowledges that neither this nor any other court has ruled on the question whether a claim to immunity from prejudgment attachment under the FSIA is immediately appealable. (See

Petition at 16-17.) All of the cases NNPC cites deal with denials of claims to jurisdictional immunity, that is, the right to be free from suit. (See Petition, at 16-17.) NNPC has not pointed to a single case which has <u>even considered</u> the appealability question presented here, much less ruled on it. Contrary to NNPC's urgings, there is no confusion or conflict, and certiorari should be denied.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: April 7, 1992

Respectfully submitted,

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